

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VHT, INC., a Delaware corporation,

No. 2:15-cv-01096-JLR

Plaintiff,

V.

ZILLOW GROUP, INC., a Washington corporation; and ZILLOW, INC., a Washington corporation,

PARTIES' JOINT SUBMISSION ON
AMENDED PROPOSED VERDICT
FORMS

Defendants.

Pursuant to the Court's Minute Order dated January 26, 2017 [Dkt. 249], the Parties respectfully submit this joint submission, which includes each party's amended proposed verdict form, and statement in support of its proposed verdict form.

PARTIES' JOINT SUBMISSION ON AMENDED
PROPOSED VERDICT FORMS

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DWT 31197378v1 0104728-000001

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**PLAINTIFF'S STATEMENT IN SUPPORT OF ITS
AMENDED PROPOSED VERDICT FORM**

In light of the legal and factual developments since January 9, 2017, Plaintiff VHT, Inc. (“VHT”) hereby submits its amended proposed verdict form, attached hereto as Appendix A (the “VHT Form”). Recognizing that its initial proposed verdict form may have glossed over certain points the jury must consider in reaching its verdict, VHT designed the VHT Form to provide the jury with a rational and clear series of questions to answer that accurately reflect the claims VHT is bringing against Zillow, Zillow’s defenses to those claims, and the actual and statutory damages the jury will need to award for any VHT Photos it finds that Zillow has infringed.

By contrast, Zillow's amended proposed verdict form, attached hereto as Appendix B (the "Zillow Form") contains an ambiguous series of inquiries that will confuse and mislead the jury regarding the questions they need to answer. The following examples, contrasting the parties' proposed forms, demonstrate why the Court should use the VHT Form in this case.

First, while the VHT Form accurately reflects the three distinct claims VHT is asserting in this case – direct, contributory and vicarious infringement – the Zillow Form wholly ignores those separate claims and their separate elements, to the point that it improperly and confusingly suggests to the jury that prior notice is an element of direct and vicarious infringement.

Second, the VHT Form correctly identifies the two affirmative defenses Zillow has raised: implied license and fair use. The Zillow Form, by contrast, (a) omits fair use; (b) inaccurately suggests Zillow’s implied license defense rests on the terms of VHT’s SLA and TOU (p. 1), the terms and enforceability of which are irrelevant to Zillow’s license defense, which must be based on the conduct/actions/intent of VHT and Zillow under *Effects Associates v. Cohen*, 908 F.2d 555, 558-559 (9th Cir. 1990); and (c) unnecessarily and suggestively asks the jury to repeatedly subdivide the images into SLA/TOU on pages 2-6.

Third, the Zillow Form confusingly seeks to sub-divide the VHT Photos at issue into five groups, primarily based on whether the images were actually displayed to Digs users and whether that display occurred before or after VHT had provided specific notice of infringement to Zillow.

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1 These distinctions ignore VHT's claims for infringement of its reproduction and derivative works
 2 rights, case law on Zillow's liability for making the VHT Photos available for display on Digs,
 3 and the irrelevance of notice to most of VHT's claims. Indeed, this organization is so confusing it
 4 appears to have confused Zillow *itself*: the five sets of images identified on pages 2-6 of the
 5 Zillow Form add up to 28,220 images, 17 **more** than are actually at issue in this case.

6 **Fourth**, while the VHT Form addresses damages issues in a focused and straightforward
 7 manner at the end of the form, the Zillow Form confusingly intermixes liability and damages
 8 questions, asking the jury to repeatedly determine issues of willfulness and eligibility for statutory
 9 damages for separate sets of VHT Photos, while leaving the calculation of both statutory and
 10 actual damages to a brief section at the end. That final section provides the jury with no guidance
 11 on making those calculations, fails to have the jury address the issue of independent economic
 12 value, and misleadingly suggesting that VHT must prove a specific "total amount of money...it is
 13 owed" in the form of statutory damages, which mischaracterizes the purpose of statutory
 14 damages, ignoring its punitive (as well as compensatory) purposes.

15 In addition, the VHT Form takes into account the Court's rulings on the validity of VHT's
 16 copyrights in the 28,203 photos at issue in this case and the Ninth Circuit's ruling in *Perfect 10,*
 17 *Inc. v. Giganews, Inc., et al.*, No. 15-55500, 2017 WL 279504 (9th Cir., Jan. 23, 2017). As the
 18 Court is well aware, the parties sharply disagree regarding the effect of *Giganews* on the claims
 19 the jury is considering in this case, which dispute they plan to raise with the Court in the FRCP 50
 20 motion Defendants have indicated they plan to file once VHT rests its case. VHT will not use this
 21 submission to argue that issue, but notes simply that, beyond finally confirming the Ninth
 22 Circuit's view that volitional conduct is an element of direct copyright infringement, *Giganews*
 23 did not purport to change existing Ninth Circuit law on other aspects of copyright law, including
 24 longstanding precedents regarding contributory and vicarious infringement.

25 For these reasons, VHT respectfully asks the Court to use the VHT Form as the verdict
 26 form provided to the jury in this matter.

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**DEFENDANTS' STATEMENT IN SUPPORT OF THEIR
AMENDED PROPOSED VERDICT FORM**

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APPENDIX A – PLAINTIFF’S AMENDED PROPOSED VERDICT FORM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VHT, INC., a Delaware corporation,

Plaintiff,

V.

ZILLOW GROUP, INC., a Washington corporation; and ZILLOW, INC., a Washington corporation,

Defendants.

No. 2:15-cv-1096-JLR

PLAINTIFF'S REVISED PROPOSED JURY VERDICT FORM

We, the jury, answer the questions submitted by the Court as follows:

Direct Copyright Infringement

1. Has Zillow (i) reproduced or (ii) publicly displayed or (iii) created derivative works from or (iv) distributed via an email or blog post any of the [28,203] VHT Photos at issue?

_____ Yes _____ No

2. If your answer to Question 1 was “Yes”, for how many of the [28,203] VHT Photos at issue has Zillow taken at least one of those four actions? Enter that number below. If your answer to Question 1 was “No”, please enter zero below.

Enter the number here:

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Contributory Copyright Infringement

3. For each of the [28,203] VHT Photos at issue **not included** in your answer to Question 2 above, has Zillow with actual knowledge of infringing use, either (i) induced users of Zillow.com to reproduce **or** publicly display **or** create derivative works from any VHT Photos, **or** (ii) materially contributed to any of those actions by users?

Yes _____ No

4. If your answer to Question 3 was “Yes”, for how many of the [28,203] VHT Photos at issue not included in your answer to Question 2 above has Zillow taken at least one of the acts in Question 3? Enter that number below. If your answer to Question 3 was “No”, please enter zero below.

Enter the number here:

5. Please add the numbers you entered in response to Questions 2 and 4 above and enter it below. Note that your total should not exceed [28,203].

Enter the number here:

Vicarious Copyright Infringement

6. For each of the [28,203] VHT Photos at issue not included in your answer to Question 5 above, has Zillow created a platform where users can reproduce or publicly display or create derivative works from any VHT Photos, where Zillow (i) has the right and ability to control the acts of those users, and (ii) has benefited from those acts by users?

7. If your answer to Question 6 was "Yes", for how many of the [28,203] VHT Photos at issue not included in your answer to Question 5 above has Zillow taken at least one of the acts in Question 6? Enter that number below. If your answer to Question 6 was "No", please enter zero below.

Enter the number here:

8. Please add the numbers you entered in response to Questions 5 and 7 above and enter it below. Note that your total should not exceed [28,203].

Enter the number here:

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Affirmative Defense: Implied License

9. Of the VHT Photos included in your answer to Question 8 above, did Zillow have an implied license to use any of them on Digs?

_____ Yes _____ No
10. If your answer to Question 9 was "Yes", for how many of the VHT Photos included in your answer to Question No. 8 did Zillow have an implied license to use those photos on Digs? Enter that number below. If your answer to Question 9 was "No", please enter zero below.

Enter the number here: _____

11. Please subtract the number you entered in response to Question 10 from the number you entered in response to Question 8 and enter it below.

Enter the number here:

Affirmative Defense: Fair Use

12. Of the number of VHT Photos included in your answer to Question 2 above, did Zillow's reproduction of any of those photos for use on Digs constitute a fair use?

Yes No

13. If your answer to Question 12 was “Yes”, for how many of the VHT Photos included in your answer to Question No. 2 was Zillow’s reproduction of those photos for use on Digs a fair use? Enter that number below. If your answer to Question 12 was “No”, please enter zero below.

Enter the number here:

14. Please subtract the number you entered in response to Question 13 from the number you entered in response to Question 11 and enter it below.

Enter the number here:

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Copyright Infringement—Damages

15. Of the VHT Photos identified in your answer to Question 14, how many are eligible for statutory damages?

Enter the number here: _____

16. Subtract the number you entered in response to Question 15 from the number you entered in response to Question 14 and enter the resulting number below. This number represents the number of VHT Photos you identified in your answer to Question 14 which are only eligible for actual damages.

Enter the number here: _____

Copyright Infringement—Actual Damages and Profits

17. If you have found that Zillow has infringed any of the VHT Photos, you must award VHT both its actual damages (the amount of a reasonable, license fee for the number of infringed photographs) and the amount of Zillow's infringing profits that is not included in VHT's actual damages. Use Instruction Numbers [TO BE DETERMINED] to guide your award of actual damages and infringing profits. As indicated below, first calculate VHT's actual damages and Zillow's infringing profits using the total number of infringed VHT Photos, as identified in your answer to Question 14. Then separately calculate actual damages using only the VHT Photos that are not eligible for statutory damages, as identified in your answer to Question 16.

First, calculate actual damages and Zillow's profits from **all** infringed images.

a. How much actual damage do you find that VHT suffered as a result of Zillow's infringement of the VHT Photos? Use the number of VHT Photos that you found Zillow infringed in Question 14 to calculate this award.
Enter that amount here: \$ _____

b. How much of Zillow's profits are attributable to its infringement of the VHT Photos? Use the number that you found Zillow infringed in answering Question 14 to calculate this award.
Enter that amount here: \$ _____

Next, calculate actual damages and Zillow's profits from infringement of only the photographs that are **not** eligible for statutory damages.

c. How much actual damage do you find that VHT suffered as a result of Zillow's infringement of the VHT Photos? Use only the number of VHT Photos that you found Zillow infringed in Question 16 to calculate this award.

Enter that amount here: \$

d. How much of Zillow's profits are attributable to its infringement of the VHT Photos? Use only the number of VHT Photos that you found Zillow infringed in Question 16 to calculate this award.

Enter that amount here: \$

PARTIES' JOINT SUBMISSION ON AMENDED
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Copyright Infringement—Statutory Damages

18. If you have found that Zillow has infringed any of the VHT Photos identified in your
2 answer to Question 15, you must award statutory damages to VHT for those photos,
3 which VHT may elect after your verdict to receive instead of actual damages and
4 infringing profits for those VHT Photos. Use Instruction Nos. [TO BE
DETERMINED] to guide your award of statutory damages.

5 a. Do the VHT Photos identified in your answer to Question 15 each have independent
6 economic value?

7 _____ Yes _____ No

8 b. If you answered “Yes” to Question 18(a), each of those VHT Photos is an infringed
9 work. You will use the same total you found in answering Question 15 above to
calculate statutory damages.

10 Enter total from Question 15 here: _____

11 c. If you answered “No” to Question 18(a), then how many of the VHT Photos
12 identified in your answer to Question 15 have independent economic value?

13 Enter that number here: _____

14 19. Do you find Zillow's conduct to be willful, innocent, or regular?

15 _____ Willful (\$750-\$150,000 per work)

16 _____ Regular (\$750-\$30,000 per work)

17 _____ Innocent (\$200-\$30,000 per work)

18 20. If you answered “Yes” to Question 18(a), calculate the total amount of statutory
19 damages by deciding on a statutory damages award for each infringement within the
20 range you selected in Question 19, and then multiply the award by the number
21 identified in your answer to Question 18(b). Write that figure below, and then go to the
end of this verdict form.

22 Enter total statutory damages here: _____

23 21. If you answered “No” to Question No. 18(a), calculate the total amount of statutory
24 damages by deciding on a statutory damages award for each infringement within the
25 range you selected in Question 19, and then multiply the award by the number
identified in your answer to Question 18(c). Write that figure below, and then go to the
end of this verdict form.

26 Enter total statutory damages here: _____

27 PARTIES' JOINT SUBMISSION ON AMENDED
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1 ***INSTRUCTION: Sign this verdict and notify the bailiff.***
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5 FOREPERSON

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1 **APPENDIX B – DEFENDANTS’ AMENDED PROPOSED VERDICT FORM**

2 **License Defense**

3 Was Zillow’s use of VHT’s images on Digs authorized by an express or implied license?
4 Answer separately for categories of images that are or may be subject to different forms of
5 customer licenses from VHT.

6 *SLA Form of Agreement?:*

7 *Claimed TOU Form of Agreement?*

8 **If you answered YES for ALL categories of images, do not answer any further
9 questions and return this form to the bailiff. If you answered NO for any
10 category/categories of images, please continue to the next page, but only answer the
11 questions that follow respecting the category/categories of images whose use by Zillow you
12 found to be unlicensed.**

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1 **Undisplayed Images Posted Before Specific Identification**

2 22,081 of the 28,203 images at issue in this case were:

3 (i) created in Digs before VHT specifically identified them or the address of the
4 property they depict to Zillow; and
5 (ii) were never displayed to users.

6 15,015 of these images are eligible for statutory damages, and 7,066 are not. Answer only
7 respecting categories of images that you have found to be unlicensed.

8 • Of the 15,015 that are eligible for statutory damages,
9 • 13,188 are subject to a form of the SLA

10 *Number Infringed, if any:*

11 **IF ANY:**

12 *Innocent/Willful/Neither?*

13 • 1,827 may be subject to a form of the TOU.

14 *Number Infringed, if any:*

15 **IF ANY:**

16 *Innocent/Willful/Neither?*

17 • Of the 7,066 that are not eligible for statutory damages,
18 • 6,092 are subject to a form of the SLA

19 *Number Infringed, if any:*

20 • 974 may be subject to a form of the TOU.

21 *Number Infringed, if any:*

22 **Turn to the next page**

1 **Displayed, Non-Searchable Images Posted Before Specific Identification**

2,078 of the 28,203 images at issue in this case were:

3 (i) "Private" or "Board Only" images;

4 (ii) posted by users to their own Digs boards before VHT specifically identified them
5 or the address of the property they depict Zillow;

6 (iii) never selected by Zillow to be searchable on Digs; and

7 (iv) at some point displayed to users.

8 1,542 of these images are eligible for statutory damages, and 536 are not. Answer only
9 respecting categories of images that you have found to be unlicensed.

10 • Of the 1,542 that are eligible for statutory damages,
11 • 1,294 are subject to a form of the SLA

12 *Number Infringed, if any:*

13 **IF ANY:**

14 *Innocent/Willful/Neither?*

15 • 248 may be subject to a form of the TOU.

16 *Number Infringed, if any:*

17 **IF ANY:**

18 *Innocent/Willful/Neither?*

19 • Of the 536 that are not eligible for statutory damages,
20 • 442 are subject to a form of the SLA

21 *Number Infringed, if any:*

22 • 94 may be subject to a form of the TOU.

23 *Number Infringed, if any:*

24 **Turn to the next page**

Displayed, Searchable Images Posted Before Specific Identification

3,928 of the 28,203 images at issue in this case were:

- (i) “Searchable” or “Searchable Board” images;
- (ii) posted to Digs before VHT specifically identified them or the address of the property depict to Zillow;
- (iii) selected by Zillow to be searchable on Digs; and
- (iv) at some point displayed to users.

2,706 of these images are eligible for statutory damages, and 1,222 are not. Answer only respecting categories of images that you have found to be unlicensed.

- Of the 2,706 that are eligible for statutory damages,
 - 2,570 are subject to a form of the SLA

Number Infringed, if any:

IF ANY:

Innocent/Willful/Neither?

- 136 may be subject to a form of the TOU.

Number Infringed, if any:

IF ANY:

Innocent/Willful/Neither?

- Of the 1,222 that are not eligible for statutory damages,

- 1,149 are subject to a form of the SLA

Number Infringed, if any:

- 73 may be subject to a form of the TOU.

Number Infringed, if any:

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1 **Images Created After Specific Identification, Regardless of Type or Display**

2 131 the 28,203 images at issue in this case were posted to Digs after VHT
3 specifically identified them or the address of the property they depict to Zillow. All of these
4 images are eligible for statutory damages. Answer only respecting categories of images that
5 you have found to be unlicensed.

6 • 125 are subject to a form of the SLA

7 *Number Infringed, if any:*

8 **IF ANY:**

9 *Innocent/Willful/Neither?*

10 • 6 may be subject to a form of the TOU.

11 *Number Infringed, if any:*

12 **IF ANY:**

13 *Innocent/Willful/Neither?*

14 **Turn to the next page**

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PARTIES' JOINT SUBMISSION ON AMENDED
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1 **Images Used in Blog and E-mail**

2 of the 28,203 images at issue in this case were used in a blog post or e-mail by Zillow.
3 Both of these images are eligible for statutory damages. Answer only respecting categories of
4 images that you have found to be unlicensed.

5 • 1 is subject to a form of the SLA

6 *Number Infringed, if any:*

7 **IF ANY:**

8 *Innocent/Willful/Neither?*

9 • 1 may be subject to a form of the TOU.

10 *Number Infringed, if any:*

11 **IF ANY:**

12 *Innocent/Willful/Neither?*

13 **Turn to the next page**

1 DATED this 27th day of January, 2017.

2 DAVIS WRIGHT TREMAINE LLP

3 s/ Max Hensley

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, I electronically served the foregoing on counsel of record for Defendants Zillow, Inc. and Zillow Group, Inc., pursuant to the parties' agreement on electronic service under Rule 6(d).

DATED this 27th day of January, 2017.

Davis Wright Tremaine LLP
Attorneys for Plaintiff VHT, Inc.

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